

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 3:99 CR 200 (CFD)
	:	Civil No. 3:02 CV 1192 (CFD)
HENRY OCASIO	:	

RULING

Pending is Ocasio's Pro Se Motion for Reconsideration of this Court's Ruling of June 3, 2004, denying his Motion to Vacate under 28 U.S.C. § 2255. See Doc. # 173; see also Docs. # 158, 160, 167, 170 (petitioner's Motion to Vacate, Motion for Leave to Amend Motion to Vacate, Motion for Leave to Supplement, and amended Motion to Vacate). For the reasons discussed below, the Motion for Reconsideration is denied.

I. Procedural History

On February 2, 2000, the defendant, Henry Ocasio, pled guilty to Count One of an indictment charging him with conspiring to distribute 500 grams or more of a mixture or substance containing a detectable amount of cocaine, in violation of section 846 of Title 21 of the United States Code. As part of his plea, Ocasio stipulated that the relevant conduct for his base offense level under the Sentencing Guidelines involved 10 kilograms of cocaine and 7 kilograms of heroin. On June 18, 2001, Ocasio was sentenced to 135 months' imprisonment, to be followed by a 5-year term of supervised release.¹ Judgment entered on June 27, 2001. On July 6, 2001, Ocasio filed an appeal with the United States Court of Appeals for the Second Circuit.

¹ Ocasio's Guideline range was 135 to 168 months' imprisonment and four to five years' supervised release. The sentence was within the statutory maximum of twenty years under 21 U.S.C. § 841(b)(1)(C).

The Second Circuit affirmed the judgment and sentence on April 4, 2002.

Ocasio then filed a Motion to Vacate his conviction, alleging four grounds for relief under 28 U.S.C. § 2255: (1) that he received ineffective assistance of counsel because (a) Ocasio's counsel allowed him to plead guilty and stipulate to relevant conduct (related to the heroin) for which he was never "arrested or indicted"; and (b) Ocasio's counsel failed to object to an upward departure from his guidelines range as to supervised release; (2) that this Court erroneously permitted the United States to "constructively amend" the indictment by including the quantity of heroin in Ocasio's sentencing guidelines calculation; (3) that this Court violated Federal Rule of Criminal Procedure 11 by failing to inform Ocasio of the nature and significance of his supervised release term; and (4) that the United States committed "misconduct" because there was no evidence that Ocasio was involved in any conspiracy until *after* the seizure of cocaine from one of Ocasio's co-defendants. On June 3, 2004, the Court denied Ocasio's Motion to Vacate on all grounds. See Doc. # 173. The Court further ordered that no certificate of appealability should issue, as Ocasio had not met the threshold requirement under 28 U.S.C. § 2253(c)(2) of a "substantial showing of the denial of a constitutional right."

Ocasio now moves for reconsideration of the Court's ruling, pursuant to Fed. R. Civ. P. 59(e).² He argues that the Court abused its discretion at sentencing, because Ocasio's Guideline sentencing range was based on alleged relevant conduct (i.e., the stipulated drug quantities) that

² Ocasio also claims that he did not receive the Court's ruling on his § 2255 petition until July 26, 2004, too late to appeal that ruling to the U.S. Court of Appeals for the Second Circuit, or to timely file a motion for reconsideration. See Doc. #174 at 2. Nonetheless, this Court agreed to entertain his motion for reconsideration. The Court expresses no opinion on Ocasio's claimed delay in receiving the ruling and concomitant loss of appeal rights, other than to reiterate that it found no cause to issue a certificate of appealability in his case.

was not found by a jury to be proven beyond a reasonable doubt. Ocasio claims that his sentence therefore violates the Sixth Amendment according to the recent decisions of Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 124 S. Ct. 2531 (2004); United States v. Booker, 125 S. Ct. 738 (2005); and United States v. Fanfan, 125 S. Ct. 738 (2005).³

II. Discussion

The standard for granting a motion for reconsideration under Fed. R. Civ. P. 59(e) is “strict.” Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Reconsideration will “generally be denied unless the moving party can point to . . . matters . . . that might reasonably be expected to alter the conclusion reached by the court.” Id. As Ocasio’s Apprendi argument previously was evaluated on appeal and denied by the Second Circuit, his request for reconsideration on that ground is denied.⁴ See Doc. #157 (Mandate issued by Court of Appeals Apr. 25, 2002).

Although the Booker/Fanfan decisions came down from the Supreme Court during the pendency of Ocasio’s motion for reconsideration, they do not change the outcome of his

³ The Booker and Fanfan cases bear the same citation, as they were consolidated for purposes of Supreme Court review. While Ocasio filed his motion for reconsideration before Booker and Fanfan were decided, he did cite the pendency of those cases as supporting his claim. See Doc. #178 (Pro Se Petitioner’s Reply to Government’s Objection to Motion for Reconsideration). The Court therefore analyzes Ocasio’s claims in light of the recent Booker/Fanfan decisions.

⁴ As the Second Circuit held in Ocasio’s direct appeal, “This Circuit’s caselaw since Apprendi has stated that uncharged drug quantity may be considered at sentencing as part of a defendant’s relevant conduct, so long as the resulting sentence does not exceed the statutory maximum, or cause the imposition of a statutory mandatory minimum sentence. This sentencing factor may be determined by the judge under a preponderance of the evidence standard and need not be submitted to a jury.” United States v. Ocasio, 32 Fed. Appx. 5, 5-6 (2d Cir. 2002).

petition.⁵ The Second Circuit has held that Booker is not retroactive and “does not apply to cases on collateral review where the defendant’s conviction was final as of January 12, 2005.”

Guzman v. United States, 404 F.3d 139, 144 (2d Cir. 2005). A judgment of conviction becomes final “when the time expires for filing a petition for certiorari contesting the appellate court’s affirmation of the conviction.” Clay v. United States, 537 U.S. 522, 525 (2003). Ocasio’s conviction became final on July 3, 2002, ninety days after the Second Circuit issued its judgment on his direct appeal.⁶ Ocasio therefore is time-barred from seeking post-conviction relief on the basis of Booker.

III. Conclusion

Petitioner’s Pro Se Motion for Reconsideration [Doc. #174] is DENIED. The Clerk is directed to close the case.

So ordered this ____20th____ day of June 2005 at Hartford, Connecticut.

____/s/ CFD_____
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

⁵ The Booker/Fanfan decisions also changed the Second Circuit’s interpretation of Blakely v. Washington. Prior to the Booker decision, the Second Circuit had ruled that Blakely did not apply to the federal Sentencing Guidelines. See United States v. Mincey, 380 F.3d 102 (2d Cir. 2004). After Booker, Mincey is no longer relevant. The Second Circuit provided a post-Booker interpretive opinion in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). This Court looks to Crosby and subsequent decisions in evaluating Ocasio’s motion.

⁶ Ocasio’s claim that he did not receive this Court’s original ruling on his § 2255 petition until July 2004, too late to seek appellate review from the Second Circuit, has no effect on the finality of his conviction. Finality is dated from the expiration of direct appeal rights, and is not affected by the pendency of post-conviction collateral attacks.